

Supreme Court, U. S.
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IN THE SUPREME COURT
OF
THE UNITED STATES

October Term, 1977

No. 77-469

ROCCO FERRERA & CO.
a Michigan corporation,
Petitioner,

vs.

HAROLD MORRISON,
TRUSTEE OF ATLAS
CONCRETE PIPE, INC.,
and/or ATLAS CONCRETE
CONDUIT, INC.

SUPPLEMENTAL APPENDIX TO
~~PETITION FOR WRIT OF~~
~~CERTIORARI~~

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SUPPLEMENTAL APPENDIX TO
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CERTIORARI TO
UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

Now comes Rocco Ferrera & Co., a Michigan corporation, by and through its attorneys, Brashear, Conley and Tangora, and presents to the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States this Supplemental Appendix to Petition for Writ of Certiorari.

In the Matter of Harold MORRISON,
Trustee of Atlas Concrete Pipe, Inc.
and/or Atlas Concrete Conduit, Inc.,
Plaintiff and Counter Defendant
Appellee,

v.

ROCCO FERRERA & CO., INC., a
Michigan Corporation, Defendant
and Counter Plaintiff Appellant.

No. 74-60655

United States District Court
E. D. Michigan, S.D.

Nov. 17, 1975

Appeal was taken from order of the
bankruptcy judge denying counter plaintiff's
motion to dismiss for lack of jurisdiction.

The District Court, James Harvey, J.,
held that dismissal of Chapter X reorgani-
zation proceedings and discharge of trustee
did not entitle defendant to dismissal of
action, that accepting allegations of plain-
tiff, defendant owed bankrupt money, and

accepting allegations of defendant, it had property belonging to bankrupt in its possession, defendant's general denial of liability did not oust bankruptcy court of jurisdiction; and that defendant's filing of counter-claim was clear consent to jurisdiction of bankruptcy court, even if the bankruptcy court did not have property within its constructive possession.

Finding of bankruptcy court that it had jurisdiction affirmed and case remanded for trial.

1. Bankruptcy § 662.2

Proceedings following terminations of Chapter X reorganization proceeding are continuous therewith, so that person who was appointed receiver or trustee in bankruptcy assumes position of real party in interest formerly held by Chapter

X trustee. Bankr Act, §§ 236 (2), 238, 11

U.S.C.A. §§ 636(2), 638.

2. Bankruptcy § 662

Under Bankruptcy Act section providing that proceedings after reorganization are to be conducted in same manner and with like effect as if a voluntary petition for adjudication had been filed at time when petition under Chapter X was filed and decree of adjudication had been entered at time when petition was approved, the intention is to "roll the clock back" so that matters commenced under reorganization proceeding are treated as if begun under ordinary bankruptcy proceedings and ordinary bankruptcy proceeding is treated as if begun when reorganization proceedings began.

Bankr. Act §§ 236(2), 238, 11 U.S.C.A.

§§ 636(2), 638.

3. Bankruptcy § 662.2

Proceedings following entry of order that bankruptcy be proceeded with are continuation of Chapter X reorganization proceedings and as such there is no reason why receiver or trustee in bankruptcy should not step into shoes of Chapter X trustee as real party in interest. Bankr. Act §§ 236(2), 238, 11 U.S.C.A. §§ 636(2), 638.

4. Bankruptcy § 662

That Chatper X reorganization proceedings were dismissed and trustee discharged did not entitle defendant debtor, which had been sued by trustee, to dismissal on basis that the Chapter X proceedings had been terminated where, six days after objection for substitution, receiver was appointed. Bankruptcy Rules, rule 717, 28 U.S.C.A.; Fed Rules Civ.

Proc. rule 17, 28 U.S.C.A.

5. Bankruptcy § 293 (1)

Under section of Bankruptcy Act creating jurisdiction of bankruptcy courts and conferring original jurisdiction in both law and equity to cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, if chose in action is within estate of bankrupt, the section does not limit bankruptcy court to determining controversies but also empowers court to collect the debt. Bankr. Act, §§ 2, sub. (a) (7), 23, 11 U.S.C.A. §§ 11 (a)(7), 46.

6. Bankruptcy § 288(5)

Section of Bankruptcy Act which makes the Act inapplicable to certain suits by trustee or receiver against adverse claimants does not limit jurisdiction of bankruptcy

where court has property in question in its possession. Bankr. Act, § 2, sub. a (7), 23, 11 U.S.C.A. §§ 11 (a), (7), 46.

7. Bankruptcy § 288 (1)

Distinction between property claims which may be enforced summarily and those which require resort to adversarial procedure is not viable basis on which to determine whether bankruptcy court may exercise its jurisdiction. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A.

8. Bankruptcy § 288 (5)

In deciding whether bankruptcy court has jurisdiction, court need not look into whether an adversary procedure is proper, but rather the test for jurisdiction is whether court has possession, either actual or constructive, of property in question. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A.

9. Bankruptcy § 288 (5)

Bankruptcy court has constructive possession of chose in action if bankrupt remained the legal owner thereto up to time of filing the petition and if there is not a bona fide dispute as to actual existence of chose in action. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A; Bankr. Act §§ 236 (2), 238, 11 U.S.C.A. §§ 636 (2), 638.

10. Bankruptcy § 676.1 (2)

Where Chapter X trustee, in filing suit, alleged that bankrupt had sold to defendant merchandise for sum which remained unpaid and defendant admitted existence of contract and delivery of goods but alleged that plaintiff had not furnished goods agreed upon, so that, accepting allegations of plaintiff, defendant owed it money, and accepting allegations of

defendant, it had property belonging to plaintiff in its possession, defendant's general denial of liability, did not oust bankruptcy court of jurisdiction. Bankruptcy Rules, rules 102, 701, 28 U.S.C.A; Bankr. Act, §§ 236 (2), 238, 11 U.S.C.A. §§ 636 (2), 638.

11. Bankruptcy § 676.1 (2)

Where during Chapter X reorganization proceedings but after proceedings had been referred to referee to collect receivables, the Chapter X trustee filed claim for sum due for merchandise sold, buyer's filing of counterclaim was clear consent to jurisdiction of bankruptcy court, even if the bankruptcy court did not have property within its constructive possession. Bankr. Act, § 101 et seq. 11 U.S.C.A. § 501 et seq.

12. Bankruptcy § 676.1 (2)

Bankruptcy judge sitting by reference during Chapter X reorganization proceedings has no power to hear issues involved in regard to property in possession of one who is asserting an adverse claim. Bankr. Act, § 101 et seq. 11 U.S.C.A. § 501 et seq.

13. Bankruptcy § 662

Consent of corporation, which allegedly owed sum to debtor, to jurisdiction of referee in Chapter X reorganization proceedings was equally a consent to jurisdiction of court in later bankruptcy proceedings. Bankr. Act, § 101 et seq., 11 U.S.C.A., § 501, et seq.

14. Bankruptcy § 662

Consent to jurisdiction of judge in bankruptcy, once given, cannot be withdrawn.

Bankr. Act, § 101 et seq., 11 U.S. C.A.

§ 501 et seq.

Stewart A. Newblatt, Flint, Mich., for plaintiff and counter defendant appellee.

Robert L. Segar, Flint, Mich, for trustee.

William R. Brashear, Livonia, Mich., for defendant and counter plaintiff appellant

MEMORANDUM OPINION AND ORDER

JAMES HARVEY, District Judge.

This is an appeal from an order by Bankruptcy Judge Harold H. Bobier denying the defendant and counter-plaintiff's motion to dismiss for lack of jurisdiction.

On March 15, 1974, Atlas Concrete Pipe, Inc., plaintiff -appellee herein, filed a petition under Chapter X for reorganization. This petition was approved and a trustee was

appointed. After an order had been entered that all proceedings to collect receivables be heard before Harold H. Bobier, Bankruptcy Judge, sitting by reference, the trustee commenced an action against Rocco Ferrera & Co., Inc. for alleged indebtedness. Defendant-appellant filed an answer with a demand for jury trial and a counter-claim for breach of contract.

At this point, the Chatper X proceedings were terminated, plaintiff-appellee was adjudicated a bankrupt, and the proceedings were referred to Bankruptcy Judge Bobier for liquidation. Twelve days thereafter, on March 11, 1975, defendant-appellant filed a motion to dismiss the suit brought by the Chapter X trustee on the grounds that the Chapter X proceedings had been terminated and on the grounds that the Bank-

ruptcy Court did not have jurisdiction over a case involving the collection of a receivable owed to the bankrupt, absent the consent of the account debtor.

At a hearing on May 6, 1975, the bankruptcy judge ruled that he had jurisdiction to proceed under the general referral and that, in any event, defendant-appellant's allegations of adverse claim were generally stated and led to the conclusion that the adversity was merely colorable. Following the denial of the motion to dismiss, a receiver was appointed in the bankruptcy proceedings and the Chapter X trustee resigned.

On appeal, the parties raise the parties raise the following issues:

- (1) Should a motion to dismiss be granted where the moving party is a

defendant-debtor in a suit brought in the United States Court by a trustee under Chapter X proceedings when the Chapter X proceeding has been dismissed, its trustee discharged, and no substitution has been made by the receiver subsequently appointed in an ordinary bankrupt proceeding?

(2) Does the bankruptcy court in an ordinary bankruptcy proceeding have jurisdiction over an account receivable of a bankrupt corporation so as to render a personal judgment against the account debtor, absent the consent of the account debtor to this jurisdiction?

(2A) Can the filing of an answer by defendant-debtor in a suit by a trustee under Chapter X proceedings, where the United States District Court clearly had jurisdiction,

be construed as a consent to confer jurisdiction in the bankruptcy court in a subsequent bankruptcy proceeding?

I.

(1) There is no merit in appellant's contention that the motion to dismiss should have been granted because the Chapter X proceedings were terminated and the Chapter X trustee was no longer the real party in interest. The proceedings following the termination of Chapter X proceedings are continuous therewith, so that the person who is appointed the receiver or trustee in bankruptcy assumes the position of real party in interest formerly held by the Chapter X trustee.

(2) The language of Section 238 of the Bankruptcy Act, 11 USC 638, provides that proceedings after reorganization are to be conducted:

" . . . in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved."

The clear intent of this section is to "roll the clock back" so that matters commenced under the reorganization proceeding are treated as if begun under ordinary bankruptcy proceedings and the ordinary bankruptcy proceeding is treated as if begun when the reorganization proceedings began. In re Manufacturers Trading Corp., 194 F 2d 961 CA 6, 1952; In the Matter of Atlas Sewing Centers Inc., 437 F 2d 607, 614 CA 5, 1971.

Colliers on Bankruptcy, Fourteenth Edition, Volume 6A, Section 12.05 (3),

dealing with results following the entry of
an order that bankruptcy be proceeded
with, states the rule:

"(U)pon failure of the reor-
ganization and the entry of an
order under Section 236 (2), the
proceeding in effect becomes one
of involuntary bankruptcy. The
order directing bankruptcy li-
quidation, however, does not
initiate a new bankruptcy pro-
ceeding at that point; the
order instead is merely one in
a continuous proceeding begun
when the original petition for
bankruptcy is filed." (emphasis
in original footnotes omitted)

(3) It is clear, thus, that the proceedings
following the entry of an order that bank-
ruptcy be proceeded with are a continua-
tion of the Chapter X proceedings. As
such, there is no reason why the receiver
or trustee in bankruptcy should not step
into the shoes of the Chapter X trustee as
the real party in interest. Section 238
states:

" (a) trustee shall be elected or appointed pursuant to section 72 of this title and shall supersede any trustee previously appointed."

This last-quoted language clearly implies that the trustee in bankruptcy, when appointed, shall take over from the Chapter X trustee. Due to the continuous nature of the proceedings, there is no reason why the receiver in bankruptcy would not stand in the same position.

(4) Accordingly, upon the appointment of a receiver, the receiver became the real party in interest to the action commenced by the Chapter X trustee. It is irrelevant that the receiver had not been appointed when appellant filed his motion to dismiss. Bankruptcy Rule 717, making Rule 17 of the Federal Rules of Civil Procedure applicable to bankruptcy pro-

ceedings, allows a reasonable time after objection for substitution. The delay of six days between objection and appointment of the receiver was not unreasonable.

II.

Appellant also maintains that his motion to dismiss should have been granted because a bankruptcy court may not exercise its jurisdiction to enforce a debt against a debtor of the bankrupt without the debtor's consent. There is support in authority for appellant's position, but for the reasons stated herein, the Court is of the opinion that the controlling rule is that the bankruptcy court may determine and enforce the rights of various claimants to any property which is within its possession.

Although it is well established that a

court of bankruptcy may determine the rights of claimants to property within its possession, this rule has been held inapplicable where the property consists of a chose in action and the trustee is undertaking to enforce the bankrupt's claims against the debtor. In general, see *Colliers on Bankruptcy*, Fourteenth Edition, Volume 2, Section 23.05. There is no valid reason for imposing this distinction.

Colliers, supra, at 23.05 (4) states that a bankruptcy court may determine the rights of various claimants to an intangible which is within its constructive possession.

"Where the intangible consists of a chose in action, such as a debt or a contract claim, such intangible may be said to be in the constructive possession

of the bankruptcy court so as to enable the court summarily to determine the rights of various claimants to the chose in action, if the bankrupt remained the legal owner up to the time of filing of the petition." (footnote omitted)

If the bankruptcy court may determine the rights of claimants to a chose in action, it may also enforce those rights against the debtor of the bankrupt. Section 2 (a) (7) of the Bankruptcy Act, 11 USC 11 (a) (7) (1970) creating the jurisdiction of the bankruptcy courts, confers original jurisdiction in both law and equity to:

"Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as otherwise herein provided."

(5) If a chose in action is within the estate of the bankrupt, Section 2 (a) (7) does not limit the bankruptcy court to determining

controversies but also empowers the court to collect the debt.

(6) The only limitation imposed on Section 2 (a) (7) is that stated in Section 23 of the Bankruptcy Act, which makes the act inapplicable to certain suits by the trustee or receiver against adverse claimants. It is well settled that this section does not limit the jurisdiction of the Bankruptcy Court where the court has the property in question in its possession. Thus, in Murphy v John Hoffman Co., 211 US 562, 568-569, 29 S Ct 154, 53 L Ed 327, 330 (1909), in discussing the jurisdiction of bankruptcy courts under the statute, the Supreme Court stated:

"Jurisdiction . . . is limited to courts where the bankrupt himself could have prosecuted the action . . .

but where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal and State. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property."

Colliers on Bankruptcy, Fourteenth

Edition, Volume 2, Section 23.04 (2) states the same rule:

"The power of a bankruptcy court to act summarily regarding controversies over property in its actual or constructive possession, and proceedings arising in the course of administration, is not in any way restricted by the terms of § 23."
(footnotes omitted.)

The question, thus, is why a court in bank-

ruptcy may not enforce a chose in action against the obligor thereon where such is within the court's constructive possession.

The answer traditionally given is that the procedure in bankruptcy is primarily summary, as opposed to an adversary procedure, and that it requires a plenary action with adversarial procedures to enforce a chose in action.¹ This view was echoed by this court in the case of In the Matter of Hammond Standish & Co, 126 F Supp 353, 355 (ED Mi 1954), where the court held that the bankruptcy court could not exercise its jurisdiction to enforce a chose

¹ The summary-plenary distinction relates to procedural rights and does not per se define jurisdiction. Matter of Tax Assn. of Illinois, 305 US 160, 59 S Ct 131, 83 L Ed 100 (1938), reh den 305 US 674, 59 S Ct 247, 83 L Ed 437

in action against the debtor without the
debtor's consent. Quoting from In Re
Standard Gas & Electric Co., 119 F 2d 658,
661-662 CA 3, 1941. this court stated:

"In a broad sense a claim by
a third person is property of the
debtor. As such the reorgani-
zation court may direct the prose-
cution by the trustee of the debtor
if it is appropriate to do so in
order to effect the debtor's reor-
ganization. But it is a species
of property which may only be
realized upon for the benefit of
the debtor and its creditors by
the successful prosecution of a
plenary suit against the third
persons involved."

(7) This distinction between property claims
which may be enforced summarily and those
which require resort to an adversarial proce-
dure is no longer a viable basis on which to
determine whether the bankruptcy court may
exercise its jurisdiction.

The new Bankruptcy Rules, in Part VII,

make complete provisions for adversary proceedings. Rule 701, in particular, states that these rules govern any proceeding instituted by a party before a bankruptcy judge to recover money or property. Rule 102 states that all proceedings in the case, implicitly including adversary proceedings, are to be before the referee except as specifically provided. Given the clear intent of the new rules that adversary proceedings be conducted before the referee, and these rules having made ample provision for adversary proceedings, there no longer remains any reason to deny the bankruptcy court this aspect of the jurisdiction conferred upon it.

This district's proposed local rules fully support this approach. Proposed Rule 3, Local Rules in Bankruptcy of the United

States District Court for the Eastern District of Michigan, authorizes the Bankruptcy Judges of this District Court to exercise all of the authority with which they have been empowered:

"3. JURISDICTION.

The Bankruptcy Judges of this District Court shall have concurrent jurisdiction in all divisions of this district, and they and each of them are hereby empowered and authorized to do all acts, conduct all proceedings, render all judgments and orders and perform all duties as prescribed by the Bankruptcy Act, the Rules of Bankruptcy Procedure, these rules or the rules of the United States District Court applicable in a civil action."

(8,9)Thus, in deciding whether the bankruptcy court has jurisdiction, the court need not look into whether an adversary procedure is proper. Rather, the test for jurisdiction in the bankruptcy court is whether it has possession, either actual or constructive, of the property in question.

McCullough v Matimore, 271 F 2d 161 (CA 6, 1959); In the Matter of Lehigh Valley RR, 458 F 2d 1041 (CA 3, 1972). The bankruptcy court has constructive possession of a chose in action if the bankrupt remained the legal owner thereto up to the time of filing the petition and if there is not a bona-fide dispute as to the actual existence of the chose in action. Willyerd v Buildex Co, 463 F 2d 996 (CA 6, 1972); Collier on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.05, footnote 30 and cases cited therein.

Applying these considerations to the instant case, the bankruptcy judge conducted a hearing at which time he determined that appellant's claim of adversity was colorable only. Appellant does not challenge this finding, but asserts instead that a chose in action cannot be

enforced in a court of bankruptcy because resort to a plenary procedure is required. If appellant's claim of adversity was colorable only, though, the bankruptcy court would have jurisdiction, as there would not be a bona-fide dispute as to the existence of the chose in action.

(10) The court's review of the record satisfies it that the bankruptcy court does have jurisdiction. The Chapter X trustee, in filing suit against Rocco Ferrera & Co., alleged that plaintiff delivered and sold to the defendant merchandise in a sum exceeding \$110, 00, which amount remains unpaid. Defendant, in its answer, admitted the existence of the contract and the delivery of the goods, but alleged that plaintiff did not furnish the goods agreed upon. Accepting the allegations of the plaintiff, defendant

owes it money. Accepting the allegations of the defendant, it has property belonging to plaintiff in its possession. Defendant's general denial of liability does not oust the bankruptcy court of jurisdiction. In the Matter of Four Seasons Nursing Centers of America Inc., 472 F 2d 744 (CA 10, 1972); Spach v. Johnina, 291 F 2d 619 (CA 5, 1961), cert den 368 US 985, 82 S Ct 599, 7 L Ed 2d 523.

II A.

(11) Even if it did not have the property in question within its constructive possession, the bankruptcy court would have jurisdiction to enforce the obligation of appellant to the bankrupt. During the Chapter X proceedings, but after the proceedings had been referred to the referee to collect receivables, appellee filed the claim in question and

appellant responded by filing an answer and a counterclaim. Appellant's filing of a counterclaim was a clear consent to the jurisdiction of the bankruptcy court.

Colliers on Bankruptcy, Fourteenth Edition, Volume 2, Section 23.08 (1) states the well-recognized rule that the bankruptcy court acquires jurisdiction over a claim involving property which is not in its possession by the consent of the adverse claimant:

"It is well settled that in all cases where a party is entitled to the determination of his rights in a plenary action, he may nevertheless consent to the exercise of summary jurisdiction by the bankruptcy court and in that manner have his rights adjudicated."

(12-14) The filing of a counterclaim is an unequivocal consent to the bankruptcy court's jurisdiction when done without objection.

Tamasha Town and Country Club v.

F Supp 80 (SD Cal, 1966); James Talbot Inc v. Glavin, 104 F 2d 851 (CA 3, 1939), cert den 308 US 598, 60 S Ct 130, 84 L Ed 501.

It is irrelevant that the bankruptcy judge was sitting by reference during Chapter X proceedings. The referee, the same as a judge of bankruptcy in ordinary bankruptcy proceedings, has no power to hear the issues involved in regards to property in the possession of one who is asserting an adverse claim. Weidhorn v. Levy, 253 US 268, 40 S Ct 534, 64 L Ed 898 (1920).

In general, see Colliers on Bankruptcy, Fourteenth Edition, Volume 6, Section 3.13. Since the jurisdiction of a referee and of a judge in bankruptcy in ordinary bankruptcy proceedings are the same in this respect, appellant's consent to the

Referee's jurisdiction is equally a consent to the jurisdiction of the court in the later bankruptcy proceedings. As was fully discussed in part I of this Opinion, the bankruptcy proceedings are continuous with the Chapter X proceedings and are to be conducted as far as possible as if the bankruptcy proceedings were commenced when the Chapter X proceedings were commenced. Moreover, a consent to jurisdiction, once given, cannot be withdrawn. Operators' Piano Co v First Wisconsin Trust Co, 283 Fed 904 (CA 7, 1922).

For all of these reasons, the finding of the Bankruptcy Court that it has jurisdiction over the claim in question is affirmed and the case is remanded for trial.

IT IS SO ORDERED.